EXPANSION OF THE COMMON LAW.

III. The Sword of Justice.

In the repression of crime and the active execution of the law we find a sequence from earlier to later times closely parallel to that which we have already noticed in civil jurisdiction. The King's power is at first held in reserve to be exercised only on occasions of special urgency. But, as government is consolidated, resort to the King's justice is more and more common, until it becomes the rule, and the cumbrous methods of the old popular courts are superseded. Remedies which were extraordinary become ordinary; the jurisdiction is accepted as regular, and recognized, by statutory amendment, and otherwise, in the proceedings of Parliament. But in thus becoming an everyday affair the royal jurisdiction has lost something of its ancient moral authority. Great men despise the process and executive officers even of the King's justice; poor men complain that the local influence of their powerful adversaries makes it impossible for them to get anything done. Sheriffs are cajoled or bribed; juries are often packed, sometimes bribed and sometimes intimidated. New kinds of wrongdoing, public and private, which cannot be dealt with under any of the fixed forms of the Common Law, disturb the peace of the kingdom and vex honest men. Fresh exercise of the King's residuary power is the obvious remedy. The King and the Council cannot recall or refashion the judicial functions already created; but they can supplement the shortcomings of the regular process of law; they would not be performing their duty to the kingdom if they did not. Enormous offenses call for a greater axe. Down to the reign of Charles I this was accepted doctrine. It is allowed by all recent writers on the subject that the extraordinary criminal jurisdiction of the King's Council sitting in the

Star Chamber (such was the proper style),[1] criminal equity as it has been called, was analogous to the equitable jurisdiction of the Chancellor in civil matters, as the best contemporary authorities said it was.

But extra-judicial causes, reinforced by barely plausible legal reasons only as an afterthought, led to complete divergence in the results. The "prætorian" civil jurisdiction flourished and became in due time a perfectly regular part of our judicature; the "censorial" power of the Council, while it was still imperfectly specialized, was abused for the ends of political and religious tyranny, and provoked a reaction which involved it in the general fall of Charles I's system of absolute government.

In Henry VIII's time, as Sir Thomas Smith, writing under Elizabeth, tells us, it was "marvellous necessary" to augment the authority of the Star Chamber "to repress the insolency of the noblemen and gentlemen of the north parts of England, who being far from the King and the seat of justice made almost as it were an ordinary war among themselves, and made their force their law, banding themselves with their tenants and servants to do or revenge injury one against another as they listed." Coke, a stern enough censor of encroaching jurisdictions, called the Star Chamber "the most honourable court (our Parliament excepted) that is in the Christian world," and added: "This court, the right institution and ancient orders thereof being observed, doth keep all England quiet." It is remarkable that Coke has nothing to say about the Star Chamber's very wide departure from the course of the Common Law. He states without any comment that "the proceeding in this court is by bill or information, by examination of the defendant upon interrogatories, and by examination of witnesses." Perhaps he thought that sufficient respect was paid to the Common Law, and good enough security taken for substantial justice

[1] The opinion that the Star Chamber was a new and illegal court seems to have rested partly on forgetfulness of this material fact and partly on a misunderstanding of the Act of Henry VII which gave a special jurisdiction to a statutory Commission including persons who might not be members of the Council. See Coke, 4 Inst. 62; Stephen, Hist. Cr. L. c. vi; Holdsworth i. 271; Carter, Hist. of English Legal Institutions, c. xiv. It is doubtful whether this statutory court ever acted. Apparently it might have sat anywhere in England.

being observed, by the inclusion of the two Chief Justices among the ordinary members of the court. At any rate Coke's testimony removes any suspicion of partiality that might otherwise attach to Bacon's. What Bacon says is worth citing in full, both as a good specimen of his prose and as an illustration of the received doctrine of "residual jurisdiction." He says in his History of King Henry VII;—[1]

"* * * There were that Parliament [A. D. 1487] divers excellent laws ordained. * * *

"First, the authority of the Star-chamber, which before subsisted by the ancient common laws of the realm, was confirmed in certain cases by Act of Parliament. This court is one of the sagest and noblest institutions of this kingdom. For in the distribution of courts of ordinary justice (besides the high court of Parliament), in which distribution the King's bench holdeth the pleas of the crown; the Common-place, pleas civil; the Exchequer, pleas concerning the King's revenues; and the Chancery, the Pretorian power for mitigating the rigour of law, in case of extremity, by the conscience of a good man; there was nevertheless always reserved a high and pre-eminent power to the King's counsel in causes that might in example or consequence concern the state of the commonwealth; which if they were criminal, the counsel used to sit in the chamber called the Star-chamber; if civil in the white-chamber or White-hall. And as the Chancery had the Pretorian power for equity, so the Star-chamber had the Censorian power for offences under the degree of capital. This court of Star-chamber is compounded of good elements; for it consisteth of four kinds of persons; counsellors, peers, prelates and chief justices: it discerneth also principally of four kinds of causes: forces, frauds, crimes various of stellionate, and the inchoations or middle acts towards crimes capital or hainous not actually committed or perpetrated. But that which was principally aimed at by this act was force (*suppressio turbarum illicitarum*, Latin version) and the two chief supports of force, combination of multitudes, and maintenance or headship of great persons."

[1] Works, ed. Spedding, vi. 85.

[2] *Stellionatus* is in Roman law criminal fraud not amounting to any other definite offense: Dig. XLVII. 20, Cod. IX. 34.

Thus the Council in the Star Chamber, like the Chancellor in his court, dealt partly with offenses for which there was an adequate remedy in fact in the ordinary course of law, partly with such as were not otherwise punishable at all, or not clearly so. Riot and unlawful assemblies, intimidation, forgery, miscellaneous frauds and perjury were the staple matters of its jurisdiction. There is no reason to doubt that for many years the activity of the Star Chamber was useful and even popular. It is at least doubtful whether its sentences were commonly thought too severe until it began to make itself an instrument of political persecution. In many cases the offense had been denounced, and the punishment prescribed, by Act of Parliament. It does not appear that any one protested against the absence of a jury. Defendants did object to being interrogated on oath by the court. On this point it may perhaps be doubted whether systematic and deliberate interrogation were less fair to a man on his trial than the running fire of cross-examination by the judges, restrained by no rules of evidence, which the prisoner had to stand in all ordinary criminal cases of any importance down to the Restoration. There was, however, then and long afterwards, a much sharper distinction in common opinion between sworn and unsworn assertions or answers than any honest man would now admit. An unknown man's oath seems to have weighed a good deal more with our ancestors than it does with us, and his word a good deal less. We may even read how the reason that "the law intends the oath of every man to be true" was seriously assigned for perjury being a merely statutory offence.[1] An interesting but insoluble question is what would have been the effect on our ideas and practice in the matter of criminal justice if the Star Chamber had persisted. Certainly the modern sentiment which says to the twelve men in a box "Ye are gods," could not have grown up such as we have it now. We may guess, on the other hand, that the obnoxious inquisitorial process would have come into subjection to the rules of evidence, and have been modified into something no worse than making the accused a compellable as well as a competent witness on his own behalf. The com-

[1] Stephen, Hist. Cr. L. iii. 245.

petition of the Star Chamber might even have led to improvements in the practice of the ordinary courts for which, as it fell out, we had to wait till the nineteenth century. But all this is mere speculation. Under Charles I there was a well-known series of really tyrannical prosecutions for so-called libels which would now be left to the mercies of serious or comic reviewers. The excessive sentences on Prynne and others brought the Star Chamber into hopeless disrepute. Yet the Act of 1640 which abolished the court did not deny the jurisdiction. The preamble does indeed suggest that it was derived merely from the Act of Henry VII, a view which no one now thinks defensible; it goes on to charge the court with having invented new offenses, which was true to some extent, but justifiable according to the received opinion of the King's powers and duties; with having inflicted "heavier punishments than by any law is warranted," which seems doubtful, considering the number and ferocity of sixteenth-century penal-statutes; and with having abused its process "to introduce an arbitrary power and government," which was certainly true. Not only "the court commonly called the Star Chamber" but other similar jurisdictions were severally and collectively abolished, and any attempt to erect any such "court council or judicature" forbidden for time to come. The Council of the North, the Council of Wales and the Marches, and minor jurisdictions of the same kind in the Duchy of Lancaster and county palatine of Chester—all being in the nature of criminal equity modelled on the Star Chamber practice, and having more or less statutory confirmation to show—were expressly included. In terms the abolition did not extend to the Court of Requests, which administered only civil justice; nevertheless its position became untenable, and, as we have seen, it disappeared.[1] Thus did the Star Chamber and its satellites fall upon the common law, and they were broken. After the Restoration the Court of King's Bench assumed, without objection from any one, those parts of the Star Chamber jurisdiction which were of obvious general utility, besides the more doubtful attribute

[1] Sir James Stephen points out that the other courts named in the Act were not abolished, but only their jurisdiction so far as it was like that of he Star Chamber. The effect was abolition.

of a general censorial power over publications. This quasi-judicial control of the press appears to be the principal historical origin of our modern law of copyright. It is beyond our present scope to say anything of the manner in which the subject became a battle-ground for speculative arguments derived from the eighteenth-century version of the Law of Nature, and the problem was quieted though not solved by a statutory compromise.

It is significant for our purpose that the growth of the Star Chamber and kindred jurisdictions coincides with the period in which the business and reputation of the common law courts were at their lowest point, and in which the Year Books came to an obscure end. There were men in high places who would have well liked to see Henry VIII attempt a reception of Roman law in England; if there was not a formed plot against the common law, there were all the materials for it. So my learned friend Mr. Maitland has told us with his peculiar felicity.[1] He thinks the danger was really considerable; he is disposed to ascribe its brief duration and the vigorous reaction that followed to the existence of a school of national law in the Inns of Court. We cannot actually prove a deliberate policy of depressing the ordinary courts with a view to supplant their more important functions by extraordinary jurisdictions and at last reduce them to insignificance; but it is a case of grave suspicion. At all events the impression made on a student of political history coming to the subject with a fresh mind is that the policy of the King's Council under the Tudors was directed to impressing and did impress even the ordinary course of criminal justice with an inquisitorial character.[2]

If we believe, however, that the course of the events which determine national issues is above the individual will and design of any actor in them, and that the reasons assigned by the best observers at the time, even if really operative, are seldom the whole or the most efficient, we shall regard it as a secondary question whether there was at any time a settled plan for subordinating the maintenance of public order in the King's name and by a regular system of legal

[1] English Law and the Renaissance, Cambridge, 1901.

[2] John Pollock, The Popish Plot, 289.

justice to an extraordinary royal power which would have professed to do justice but which claimed to be superior to the law. The conflict was in fact as acute and as decisive as if it had been deliberately prepared on both sides. Bacon had talked of lions under the throne. Before another generation had passed, all men might see that the Common Law was on the throne and the King's prerogative was under it. Beware how you touch points of prerogative, said James I, with Bacon's advice and approval. Prerogative is nothing but the law specially concerning the King, said Selden, and so we have all said after him.

The undefined powers of the Crown in matters of executive policy have had a different history. They have not been suppressed; they have been very little if at all impaired. They have been taken alive by a Ministry existing at the will of the House of Commons, and have enabled us to combine a democratic legislature with an executive which, when it chooses to act boldly, can be as swift and strong as any in the world. We can afford to trust our ministers with the ancient rights of the Crown, including the right to make war and peace and conclude treaties, because they can be called to account at any moment. At the time when the constitutional position of the judicature and the autonomy of the superior courts were settled, the political doctrine of ministerial responsibility was not yet known. If it had come earlier, the Star Chamber jurisdiction might have been transformed instead of being abolished; the House of Commons would, in one form or another, have interfered more actively and frequently in judicial affairs; and the appellate jurisdiction of Parliament, which as late as the Restoration was neither defined nor clearly recognized, might have been shared in some way between the two Houses instead of being confined to the House of Lords. It might be an amusing speculation whether this kind of development would have given us better or worse law than we have. I rather think it would have tended to make the courts too sensitive to political influence and the current theories of the day. Social, economical and political doctrines do leave their mark, as it is, on our unwritten law; but the movement is gradual. In about three centuries we have practically reversed our working rule about agreements in restraint of

trade, and this without a breach of continuity at any assignable point and without any aid from legislation. The mill has ground slowly but small. Would the result have been as convincing if it had been less deliberate or less detached from politics?

But let us leave guesswork. The capital fact for us is that the machinery of the King's Peace, from the Court of King's Bench to the rustic justice of petty sessions, was consolidated, between the twelfth and the sixteenth centuries, out of powers in their origin special and extraordinary; and that, having become ordinary, it was strong enough to hold its own against arbitrary additions even when they came with no small colour of public utility. How had the King's justice won the whole field and become popular in its victory? The conquest was almost dramatic in thoroughness and speed. In the first half of the twelfth century one might still talk of the blood-feud as the normal way of pursuing crime, and the nascent pleas of the Crown, the matters reserved to the jurisdiction of the King, or those lords to whom he granted royal franchises, as exceptional. By the end of that century the proceedings in serious criminal cases were already in the King's hand, or, if not initiated in his name, largely under his control.[1] The methods of proof were still archaic, but improvement was beginning. The ancient popular justice had broken down. The strong point of its methods was a very summary process when the criminal was caught red-handed. How that process became obsolete is not quite clear. A peculiar jurisdiction to punish theft in this manner, the mode of execution being decapitation by a kind of guillotine, existed under a local franchise at Halifax in Yorkshire as late as the eighteenth century, though the last instance of its exercise appears to have been in 1650.[2] But, failing this first chance, there were no satisfactory means in the popular procedure of convicting the

[1] See 13 Harv. Law Rev. 77 seq.

[2] Halifax and its Gibbet-law placed in a true light. Lond. 1708, republished at Halifax in 1761. The first edition seems not to have been known to Sir James Stephen, whose account, Hist. Cr. L. i. 265, is sufficient for most purposes. The felon had to be taken "hand-habend, backberand, or confessand", conditions which seem to have been rather loosely interpreted. The so-called jurymen were not a sworn inquest, but represented the ancient witness of the suitors and were themselves the judges "to hear, examine and determine."

guilty or clearing accused innocent persons, and no regular means at all of detecting criminals or bringing suspected persons to trial. The law had only the precarious and clumsy instruments of ordeal and outlawry. The formal condemnation of ordeal by the Church brought matters to a crisis. Perhaps the Lateran Council only set an official stamp on a practically foregone conclusion. There is clear enough proof that in England the ordeal was already discredited before the end of the twelfth century. Clerkly writers were quite prepared to hint their belief in a condemned man's innocence if a miracle had been wrought for him afterwards, as we find in a very celebrated case in the acts of St. Thomas of Canterbury. Moreover, the Church had in truth (and this should be remembered to her credit) never liked the ordeal in any form. If the water and the iron had their garnish of clerkly pomp and ritual, this was allowed for the hardness of men's hearts, and moreover gave opportunities of controlling the result which were almost certainly used, and probably used, on the whole, on the side of substantial justice. Whether the ordeal was driven out by the Lateran Council or merely expedited on the way it was already going, it disappeared, and a new mode of final trial had to be found.

One instrument of justice was still recent, favored as an enlightened invention, and capable of fresh adaptations. The contact of royal authority with popular courts had already turned the vague accusation of offenders by common report into a presentment by definite persons chosen to represent the best knowledge of the neighborhood. Already the verdict of a new or reinforced jury had been taken as equivalent to the conclusive proof against a criminal afforded by manifest facts. The red-handed manslayer or "hand-having" thief taken on fresh pursuit and with good witness had no defence open to him. "He cannot gainsay it, so let him be hanged." So the judgment of the law still ran in the thirteenth century. It seemed reasonable to some of the King's judges that deliberate confirmation of the accusing inquest by a fresh inquest of the country should be deemed as strong as ocular proof. Henry of Bratton was prepared to make trial by the country the universal and compulsory process. Most un-

fortunately for the credit of the law this direct and simple way was not taken. Criminal procedure admitted, in the Anglo-Norman period, of three ways of decision. First, summary condemnation and execution upon the suitors' direct witness of the crime. This went out of use in the course of the thirteenth century. Secondly, ordeal. This, as we said, was formally abolished. Thirdly, battle (in principle a kind of ordeal, as being the judgment of God, but having a quite distinct history), in the case, and in such case only, of an "appeal" by a widow or kinsman. This criminal appeal was really a legalized form of the blood-feud, and preserved traces of private revenge long after the enforcement of the sentence had been taken over by public justice. As late as 1409 Justice Tirwhit said "By the ancient law when one is hanged on an appeal of a man's death, the dead man's wife and all his kin shall drag the felon to execution;" and Chief Justice Gascoigne added "That has been so in our own time."[1] But in the case of the appellor dying or making default the suit passed over to the King, as the wrong included a breach of the King's peace, and the King could not do battle. For the rest, trial by battle remained possible in some civil cases, but it appears, from the early thirteenth century onwards, mostly as a cloak for a compromise made at the last moment. We hear of settlements when the champions were in the field, and of the court, by way of getting some sport for their trouble, requiring the champions to exchange a few strokes for form's sake. Archaic as it undoubtedly was,[2] trial by battle was never anything but an unpopular exotic in England. It lingered as a mere curiosity of the law till the early part of the nineteenth century, when an unexpected revival of the right to demand it in a criminal appeal brought about its formal abolition. The story is very well known and it would be useless for our present purpose to recall it here. Finally, trial by the country was introduced early in the thirteenth century as an alternative at the prisoner's option.

[1] 11 Henry IV, 12, pl. 24.

[2] The horned staff which was the proper weapon of the judicial duel may even point (though this is doubtful) to an origin earlier than the use of metals. Observe that the knightly duel of the later Middle Ages is entirely distinct, and see generally Mr. G. Neilson's excellent monograph "Trial by Combat."

The natural and reasonable course would have been to send him to a jury without option in the cases, becoming the majority, where no other mode of trial was possible. But our criminal law had already hardened into so much formalism that, notwithstanding the better example of Bracton and others, the judges disclaimed jurisdiction to summon a jury to try a prisoner who had not put himself on the country. The nominal option was not to be touched, although there was no real alternative left. Accordingly the prisoner who "stood mute" brought the whole proceeding to a dead-lock. Nothing better occurred to the champions of logic and abhorrers of usurped jurisdiction than to treat his conduct as a contempt of the King's authority, very nearly though not quite amounting to a capital offense; and this led, after a short period of unsettled practice, to the "peine forte et dure." The barbarous pedantry of turning the prisoner's right to choose his own mode of trial into an election to save his property or his conscience, as the motive might be, by suffering a cruel and contumelious death, was the worst blot on our criminal system,[1] and remained so for centuries. Neither the solution of treating the prisoner as guilty by default, nor the more benignant fiction, which we have now adopted, of treating him as having pleaded not guilty, occurred to any one. Much bolder fictions were to be used in time by the judges of the several courts to extend their jurisdiction; but perhaps we may say that in the thirteenth century the age of fictions good or bad was not yet. However, the case of a prisoner refusing to plead was not common, though we hear of it down to the eighteenth century; nor has it any traceable connexion with the general evolution of the law.

On the whole the jury triumphed in criminal as well as in civil justice. But until the sixteenth century the process was gradual and inconspicuous, and some of the most important matters were settled as it were by accident. We can now see that if the verdict of a majority had been

[1] English criminal law in general, as it was in the Middle Ages, may seem cruel to those who do not know anything of Continental methods. To those who do it will appear, as it did to Fortescue, relatively humane There is a heavy debit to the account of Roman example and learning in this matter.

accepted, the resistance of juries to the Crown in later times would have been perhaps impossible, certainly much less effective. The rule was not fixed before the fourteenth century, and I do not think it was ever laid down in terms that juries must be unanimous. It is true that the dooms of the ancient popular courts had in some countries, if not in England, to be unanimous; but the jury has nothing to do with the ancient folk-law. What was actually decided was that the verdict of fewer than twelve men would not do, and this appears to rest on a quite different, but not less archaic principle, the inherent sanctity of the number twelve. Then, as not less than twelve men would suffice, so it became the fixed custom not to have more on a petit jury; why I know not, unless that it obviously saved trouble to take the least number that sufficed. To this day the grand jury need not be unanimous, though every presentment must be made by at least twelve men. Accordingly the total number is twenty-three, making twelve a majority. During the formative period nobody that I know of had any inkling of the future political and constitutional importance of jury trial. Fortescue's panegyric on the twelve men in his "De laudibus legum Angliae" is a learned, artificial and I fear scarcely honest panegyric addressed, like the whole treatise, to exalting the Common Law above the Civil Law. The ordinary English suitor naturally knew nothing about foreign civilian procedure, and therefore could not appreciate what he had escaped. He might know something of canonical procedure through the spiritual courts. Ecclesiastical officials might be meddling and fussy; but, until late in the fifteenth century, the Courts Christian, under colour of punishing the sin of breach of faith, provided remedies in many cases of ordinary secular business which the King's justices regarded as outside their jurisdiction. There is no reason to think that Fortescue represented public opinion or troubled himself about it, or that the verdicts of juries were then particularly respected or trusted in common esteem. With the Renaissance there came a spirit of comparative inquiry and something more like impartial criticism. Sir Thomas Smith commended the jury process, not because it necessarily led to a right judgment on the merits, for "the twelve men be commonly

rude and ignorant," but because it was more expeditious than the interminable written pleading of the civilians. The first virtue of legal justice, in a society still subject to disorders, is not that it decides rightly, but that it decides at all. We have now almost forgotten this.

What really made the fortune of the jury was the excessive zeal of royal officers in the Tudor period. For a time they had made Parliament little more than an instrument for registering royal decrees; next they wanted to make jurymen passive registrars of foregone political condemnations, and that was too much. A fixed point is given by the acquittal of Sir Nicholas Throckmorton, under Queen Mary, on the charge of high treason by complicity in Wyatt's rebellion. Against the Crown and against the Court the jury found him not guilty, partly persuaded by his extremely able defence, and partly, one may guess, because a citizen of London at large "misliked the coming of the Spaniards into this realm" no less than Sir Nicholas himself. True, the jurors were reprimanded and some of them fined: but, as Sir Thomas Smith, no demagogue, tells us, "those doings were even then of many accounted very violent, tyrannical, and contrary to the liberty and custom of the realm of England." From that time the power of juries, and their function as the voice of public feeling, began to be understood; and they became capable not only of guarding the liberty of the subject, but of contributing priceless elements of common sense and business knowledge to the development of the Common Law in civil jurisdiction. On the whole they reflected common opinion faithfully enough, for better or worse. There was no warrant against a jury being misled by panic or prejudice. It fared ill with prisoners when the jurymen's political or religious aversions went along with the case for the prosecution, as was seen at the time of the Popish Plot. On the other hand an acquittal in a political prosecution, as in the case of the Seven Bishops, was for the seventeenth century the nearest equivalent to a public meeting of protest, or even to a vote of censure in the modern House of Commons. From a professional point of view it is perhaps even more material that the forms of trial by jury permanently secured the publicity of judicial proceedings.

Doubtless it was and is possible to hold a trial by jury with closed doors, and in modern practice it can be done for very special cause. But, in a general way, publicity is essential, and was so regarded in Sir Thomas Smith's day. It might, at that time, be the only means of completing the evidence. "There is nothing put in writing," he says, "but the indictment only. All the rest is done openly in the presence of the Judges, the Justices [of the peace], the inquest, the prisoner, and so many as will or can come so near as to hear it, and all depositions and witnesses given aloud, that all men may hear from the mouth of the depositors and witnesses what is said."[1] And so, by seemingly devious ways, the jury became, like the ancient courts of the county and hundred, an organ of social and not merely official justice, making sure that justice should be done in the light of day; but, unlike them, it was clear of archaic formalities and capable of furnishing material for a true legal science.

Even more instructive is the history of the King's Peace in its administrative branch. Originally the King's protection is a matter not of common right but of privilege. Every man is entitled to maintain the peace of his own house; this is a very ancient Germanic principle still echoed in the adage "An Englishman's house is his castle."[2] We may trace it in the jealous definition, still not without practical importance, of the occasions that will justify breaking doors open in execution of legal process. Now the King's house is the greatest, and therefore has a special and privileged peace, the breach of which is a grave matter indeed. Gradually this domestic peace extends to the precincts of the King's court, and those precincts are somewhat largely described. Moreover the King's servants and others about his business, which is the business of the kingdom, enjoy a special protection, and so do those to whom the King, for reasons of which he is himself the judge, has made a particular grant of it. The sanction of the

[1] Commonwealth of England, Bk. 2, c. 26. The obvious allusion to Throckmorton's case is in Bk. 3, c. 1.

[2] In the fourteenth century, if not later, the lord's peace was proclaimed at the opening of manorial courts. Is this a survival of the lord's domestic peace or a mere imitation of royal procedure? The special peace of the Bishop of Durham, and the like, in palatine jurisdictions was a delegation of the King's peace included in *jura regalia*.

King's peace is used for composing blood-feuds; it reinforces the peace of God, that is, of the Church, at holy seasons; it is extended to markets and to the great roads. Being auxiliary to the King's jurisdiction, it grows with the growth of his judicial powers. At last it is discovered that the privileges once distinct and ennumerable have covered the whole ground and been merged in a common rule. One must still expressly invoke the King's peace if one will have the benefit of the King's justice against wrong-doers; but its protection and remedies are to be had as of course when claimed in due form. Every lawful man is in the peace of God and of our lord the King. One inconvenience remained till late in the thirteenth century. The King's peace, considered as a personal protection granted by William or Henry, depended on the King's life and perished at his death. Not being fully king until he was crowned, the new king had no peace of his own in the interval, and the country was remitted to the clumsy and enfeebled resources of the sheriff and the popular courts. Evil-doers had their opportunity and made the most of it. "There was tribulation soar in the land," says the English Chronicle on the death of Henry I in 1135, "for every man that could, forthwith robbed another." But when Edward I succeeded to the throne in November, 1272, he was away on the crusade, and the prospect of a winter's interregnum was intolerable. Not only criminal justice, but all the comparatively recent forms of action which supposed a breach of the King's peace, would have been paralyzed; and, among others, the writ of trespass, fast becoming a popular remedy. The King's Council took on themselves to proclaim his peace forthwith, saying in his name: "for rendering justice and keeping of the peace we are now and henceforth "—not only after coronation—" debtors to all and sundry folk of this realm." It must have seemed a bold saying and a bold deed; but the wisdom of the new rule was so manifest that it was accepted as a conclusive precedent. We hear no more of the King's peace being suspended by the King's death, though several minor inconveniences of the same kind were allowed to persist, with no better justification, almost down to our own time. The later fiction of the Crown being a corporation sole was as useless as it is inelegant. Such an advanced

doctrine as the personification of the State was (I need hardly say) quite beyond the scope of mediæval lawyers, and indeed we are still, in England, without any apt words to express it in a legal form. In the United States it is much easier to perceive the true relations. Nevertheless the real working rule, even in England, is that the State is a corporate body of which the King and his constitutional advisers are the managing directors.

For the immediate purpose, however, it is enough that there is always a king and he is always bound to keep the peace of the realm. Justices of the peace (as we say now, but the commoner form was "of peace" down to the eighteenth century) are the King's officers appointed to see to the performance of this royal office in their respective counties. The long and complex chain of statutory authority which has defined their powers and duties goes back to the fourteenth century; but before the end of the twelfth century there were knights assigned to take the oaths of all lawful men for the maintenance of the peace. There is some ground to think that Simon de Montfort, during his short tenure of power, intended to use these earlier conservators of the peace as a check on the sheriffs. Indeed the King appears to have done the like already, though with different objects. Be that as it may, our English justices of the peace have at most times been less official persons and less subject to what we now call bureaucratic influence than any other royal officers in the world. Their judgments have not been always free from the bias of class and education, but they have also not been dictated by superiors. Down to the Restoration and later they combined the functions of subordinate judges with those of public prosecutors, and in their mixed executive and judicial capacity they did not escape the inquisitorial bent of Tudor administration and legislation. For some time we were near having a preliminary criminal procedure not unlike that of modern French law. But our modern police organization and Summary Jurisdiction Acts have completely restored the Common Law standard. The committing magistrate's court is now as open and judicial as the Court of Quarter Sessions or the superior courts themselves. Justices of the peace have naturally not contributed much to the direct

development of the law, save so far as their action has been judicially confirmed or corrected in reported cases; they are not collectively a learned or professional body, though in fact they include many learned persons, and this makes them all the more useful as a link between the profession and the general public. The modern stipendiary magistrate is a specialized and salaried justice of the peace, in somewhat the same fashion as the modern policeman is a specialized and salaried constable with additional duties and powers. With this exception, the multifarious work of justices is unpaid. The constant additions made to it by legislation down to our own time are sufficient proof that on the whole, in spite of occasional miscarriages and current jests about "justices' justice," the country is content with the manner in which it is done.

We have seen royal authority and privilege break down ancient formalism only to become themselves the new instruments of the vital national ideals whose old instruments were unmanageable. We may see a combination, as it seems, of formalism and of privilege giving our superior courts the largest immunities and powers of self-help, deliberately confirmed by modern policy. Judges cannot be sued, as we all know, for anything done or said by them in their judicial capacity; the only difference between superior and inferior courts for this purpose is that the acts of a superior court are presumed to have been within its jurisdiction, while in the case of an inferior court the competence must be proved. The law is well settled by abundant modern authority. This is an exceptional rule, for the mere fact that the judge is doing the King's business is, I need hardly say, no defence at all against a plaintiff entitled to be protected by the law of the land. The general principle is that the sheriff, for example, must find and take the right man's goods at his peril. Why are the discretion and motives of a judge not examinable? I suggest, with some diffidence, for I know of no clear early authorities, that our special rule was in the first instance due to survival of the archaic feeling that a kind of sanctity attaches to judicial acts once completed. This was reinforced by the later but still archaic reverence of the early Middle Ages for the sanctity of authentic writing, and took the technical form of holding

that ordinary methods of litigation and proof could not be admitted to falsify the record of the court. Coke did talk of the eminent position of the judges as the King's personal delegates to perform the duty of doing justice undertaken by his coronation oath; but the "sublimity" of the record appears to have chiefly weighed with him. It was possible, indeed, down to the thirteenth century, to challenge the suitors of a popular court, or the lord of a private court, for false judgment. In the Anglo-Norman time the determination was by battle; *inde perveniri potuit ad duellum.*

Convicted suitors might become infamous, the lord might lose his franchise; the judgment itself was untouched. The proceeding against jurors by attaint, which was in part statutory but was already obsolete in the practice of the sixteenth century, may perhaps be reckoned an offshoot of the same stock. All this, however, was superseded by the more effectual controlling powers of the superior courts. In the superior courts themselves means were found of correcting error and irregularity, though not on any complete or symmetrical plan. New judges had arisen in the land, who were not open to the old method of personal challenge; and, so far from any new personal remedy being provided,[1] adventurous disappointed suitors who attempt to bring actions against judges have been thoroughly rebuffed in our modern practice. Experience shows, indeed, that in England at any rate such actions are devoid of merits and almost always, merely vexatious. But the disallowance of them rests on the wider policy of maintaining to the full, and even exalting, the independence of the judicial power, and it is supported on that ground in all the modern authorities.

Not only have we given our courts an impregnable defensive position; we have put an offensive arm in their hands to deal swiftly and sharply with attempts to pervert the course of justice. Contempt of court was originally, no doubt, an offence fit for summary punishment because the court was the King's court, and to contemn it was to contemn the King. Indeed the Court of Chancery had orig-

[1] Such remedies were granted in the special cases of a judge refusing to issue a writ of *habeas corpus* or to sign a bill of exceptions. These cases, however, are abnormal.

inally no other sanction at all to enforce its process.[1] Instead of the prosaic *alias* and *pluries* of the common law jurisdiction, it launched a writ of rebellion at contumacious defendants. The absolute power of committal for contempt is among the distinctive marks of a superior court; it was vindicated for justices of assize by the late Mr. Justice Willes in his memorable judgment in *Re Fernandez*,[2] which, as I have already had occasion to note, is still the classical authority for the whole history of their office. At this day it is maintained on high general grounds of policy without regard to its origin. It is not my business here to consider whether it was wholly safe or wise to put such a weapon, unguarded by any kind of restriction, in the hands of persons exercising judicial authority in remote jurisdictions beyond seas where there is no effective professional or public opinion.

The war power known by the name, not a wholly fitting one in my opinion, of martial law was brought into renewed prominence by the recent troubles in South Africa. This is not the place to discuss the differences of opinion which still exist as to its precise extent. It is not likely that we shall ever have an authentic solution of them, as in practice an Act of Indemnity is always passed by the local legislature for the express purpose of covering doubtful cases. But I conceive it is the better opinion that the law of England, born and nurtured in times when war within the realm was very possible, is not without resources in the face of rebels and public enemies; that a right arising from and commensurate with the necessity is a part, though an extraordinary part, of the Common Law; that, though commonly and properly put in action by persons having executive authority, it is not in itself military or official, but is an extension of the King's duty to preserve the peace, and of all citizens to aid in preserving it; and that, apart from statutory indemnities, the justification for acts done in this behalf is a common-law justification, and is accordingly examinable, after the restoration of peace, in the ordinary course of justice. It would be strange if private self-defence, even to extremity in certain cases, were justifiable, and the law and the public peace themselves were legally

[1] Blackst. iv. 287. [2] (1861) 10 C. B. N. S. 3.

defenceless against enemies within the jurisdiction. The doctrine of the Crown having any prerogative in this matter, except so far as the duty of keeping the peace is specially incumbent on the king and his officers, appears to be needless in itself, and contrary to the principles of the Common Law. The opposite extreme doctrine that all acts, however necessary and proper in themselves, done in the name of so-called martial law must be illegal, and can be legalized only by an Act of indemnity, seems contrary to common sense. And this, in the absence of decisive specific authority, amounts to saying that it is also contrary to the Common Law. But the general relation of our law to common sense, reason, or natural justice—for we may use any of these or other like terms at will—is a much larger subject, of which we shall next have to speak.

FREDERICK POLLOCK.